

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>TONY J. MILLER</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 163,914 & 163,915
<b>INTERNATIONAL PAPER CO.</b>	)	
Respondent	)	
AND	)	
	)	
<b>LIBERTY MUTUAL INSURANCE CO.</b>	)	
Insurance Carrier	)	

**ORDER**

**ON** the 26TH day of May, 1994, the application of the respondent for review by the Workers Compensation Appeals Board of an Award entered by Special Administrative Law Judge William F. Morrissey, dated March 24, 1994, came on for oral argument in Topeka, Kansas.

**APPEARANCES**

The claimant appeared by and through his attorney William L. Phalen of Pittsburg, Kansas. The respondent and insurance carrier appeared by and through their attorney John I. O'Connor of Pittsburg, Kansas. There were no other appearances.

**RECORD**

The record as set forth in the Award of the Special Administrative Law Judge is herein adopted by the Appeals Board.

**STIPULATIONS**

Docket #163, 914

The respondent admits the claimant met with personal injury by accident arising out of and in the course of his employment on October 10, 1990.  
The respondent admits notice.

Admits the relationship of employer and employee on the date of accident.

Admits the parties are covered by the Kansas Workers Compensation Act.

Admits claim was timely made.

Temporary total benefits in the amount of \$4,117.98 have been paid with no additional temporary benefits being claimed by the claimant.

Medical has been furnished in the total amount of \$17,778.98 with no addition medical expense at issue.

Docket #163,915

Respondent denies claimant met with personal injury by accident arising out of and in the course of his employment for the period of each and every working day beginning May 1, 1991 and ending September 17, 1991.  
Respondent denies notice.

Admits the claim was timely made.

Admits that the parties are covered by the Kansas Workers Compensation Act.

Admits that the relationship of employer and employee existed on the dates in question.

No benefits have been paid on this claim.

**ISSUES**

Docket #163,914:

(1) What is the nature and extent of claimant's disability?

(2) What is claimant's average weekly wage?

Docket #163,915:

(1) Did claimant suffer personal injury by accident arising out of and in the course of his employment during the period of May 1, 1991 through September 17, 1991?

(2) What is the nature and extent of claimant's injury and disability?

(3) What is claimant's average weekly wage for the period May 1, 1991 through September 17, 1991?

(4) Did claimant provide notice to the respondent pursuant to K.S.A. 44-520 and if not was respondent prejudiced by this lack of notice?

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

#### **Docket #163,914**

Having reviewed the entire evidentiary record filed herein, and in addition the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

As a result of the injury occurring on or about October 10, 1990, claimant is entitled to a fifteen percent (15%) permanent partial impairment of function to the left forearm. Claimant, while working a glue machine for respondent was impaled by several glue tips and had his hand pulled into the rollers of the machine after it was inadvertently turned on while he was cleaning it. This injury resulted in a fracture to the claimant's hand. Due to improper treatment and poor healing, claimant underwent several surgical procedures in order to repair the injury.

Dr. Adolph R. Mueller was claimant's subsequent treating physician. After examining and splinting the hand he provided ongoing care to the claimant from October, 1990 through May, 1992. During this time he performed three (3) separate surgical procedures on the claimant, one of which involved a bone graft from claimant's iliac crest on his hip. Claimant alleges entitlement to an award for a whole body impairment stemming from the involvement of the hip. While the Appeals Board agrees that any disability resulting from skillful medical treatment for compensable injuries is compensable it must also be shown that claimant has lost physiological capabilities in the hip as a result of this surgery. Dr. Mueller, in discussing claimant's hip problems, opined that if claimant had not suffered any hip problem by the time of the Doctor's deposition claimant would have no future problems. Claimant failed to list any ongoing symptomatology to the hip of any permanent nature. This, coupled with Dr. Muellers comments and a lack of findings

during an examination by Dr. Prostic, convinces the Appeals Board that the claimant is entitled to no award as a result of the surgical removal of the bone graft from the iliac crest. The Appeals Board finds claimant has lost no part of his total physiological capabilities as a result of this corrective surgery.

Dr. Mueller did rate claimant at five (5) percent of the hand. Claimant was given a fifteen percent (15%) upper extremity rating from Dr. Prostic. Claimant testified to symptomatology in both the hand and the wrist. This testimony convinces the Appeals Board that the claimant's impairment should not be limited to the hand but should also include the wrist. As such, the opinion of Dr. Prostic in rating claimant's disability at fifteen percent (15%) to the forearm is the more credible medical evidence and is adopted by the Appeals Board.

#### **DOCKET #163,915**

Claimant has failed to prove by a preponderance of the credible evidence that he suffered a compensable injury arising out of and in the course of his employment during the period May 1, 1991, through September 17, 1991, to his right upper extremity.

Claimant contends that as a result of his having to wear a cast on his left wrist he was forced to overcompensate and overused the right upper extremity while employed with the respondent. Claimant was returned to work, light duty status, in the shipping department where he spent several hours per day writing with his right hand. Claimant is left hand dominant. After approximately one month on this job claimant was moved to a baler job where he was required to bale waste paper. This job also required repetitious use of the right upper extremity. Claimant alleged that he had advised Dr. Mueller of his right upper extremity symptomatology while employed with the respondent. The record does not support claimant's contention.

In July, 1991, claimant underwent a second surgical procedure which included a graft of bone harvested from the hip to the left hand. He elected not to return to work for the respondent after this surgery. In September, 1991, claimant was returned to work by Dr. Mueller. Claimant immediately began actively seeking and did obtain work in the construction field. Claimant worked for several construction companies through February, 1992, when he underwent the third surgery. Subsequent to this surgery claimant returned to work in the construction field and continued to be so employed at the time of the regular hearing. Dr. Mueller's records are devoid of any mention of complaints to claimant's right upper extremity until January, 1992. There was mention in the October 17, 1991 medical report of Dr. Mueller regarding claimant's hands. When asked about this language in his report Dr. Mueller stated he was not aware of the source of this information. He further testified that claimant's first symptoms in the right upper extremity occurred in January, 1992. This information is contradictory to claimant's position when considering that claimant did not return to work for the respondent after July, 1991.

In proceedings under the Workers Compensation Act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends. K.S.A. 44-501 (a).

K.S.A. 44-508(g) defines burden of proof as follows:

'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.

The burden of proof is upon the claimant to establish his right to an award of compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 1871 (1984).

It is the function of the trier of facts to decide which testimony is more accurate and or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of facts is not bound by medical evidence presented in the case and has a responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 785-786, 817 P.2d 212 (1991).

Dr. Mueller's medical reports clearly indicate claimant provided no information regarding right upper extremity complaints while employed with the respondent. Claimant admitted failing to inform the respondent of his right upper extremity problems. The only medical records which tie claimant's right upper extremity to his employment are those of Dr. Prostic who performed an independent medical examination at the request of claimant's attorney on April 17, 1992. Dr. Prostic, at the time of his examination of the claimant, was under the impression claimant had returned to work for the respondent and continued to work there. The doctor opined that if claimant had no right upper extremity complaints while employed with the respondent then his right upper extremity symptomatology would stem from his construction work and not from his on the job injury with International Paper Company.

The Appeals Board is not persuaded that claimant has proven by a preponderance of credible evidence that claimant suffered an injury arising out of and in the course of his employment during the period May 1, 1991 through September 17, 1991.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey dated March 24, 1994, be reversed and that the claimant, Tony J. Miller, shall be and is granted compensation

against the respondent, International Paper Company, and their insurance company, Liberty Mutual Insurance Company, for an Award of fifteen percent (15%) permanent partial impairment of function to the left forearm resulting from the injuries of October 10, 1990. Claimant is denied an Award against respondent and insurance company for an alleged accident to the right upper extremity during the period May 1, 1991, through September 17, 1991.

Based upon the average weekly wage of \$252.68, claimant is entitled to 26.86 weeks of temporary total disability compensation at the rate of \$168.46 per week in the total sum of \$4,524.84, followed thereafter by 25.97 weeks of permanent partial disability benefits at the rate of \$168.46 per week totaling \$4,375.08.

As of October 17, 1994, there would be due and owing to the claimant 26.86 weeks of temporary disability compensation at the rate of \$168.46 per week in the sum of \$4,524.84, followed thereafter by 25.97 weeks permanent partial functional impairment at the rate of \$168.46 totalling \$4,375.08 making a total due and owing of \$8,899.92 to be paid in one lump sum minus the amount previously paid.

Unauthorized medical expense of up to \$350.00 is ordered paid to or on behalf of the claimant upon presentation of proof of such expense.

Claimant's attorney fee contract is approved in so far as it is not inconsistent with K.S.A. 44-536.

Fees necessary to defray the expense of the administration of the Workers Compensation Act are assessed against the respondent and insurance carrier to be paid as follows:

William F. Morrissey Special Administration Law Judge	\$150.00
Martin D. Delmont Transcript of Regular Hearing	\$ 60.75
Deposition of Adolph R. Mueller, M.D.	\$213.90
Patricia K. Smith Deposition of Tony J. Miller	Unknown
Hostetler & Associates Deposition of Edward J. Prostic, M.D.	\$176.45

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October, 1994.

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BOARD MEMBER

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BOARD MEMBER

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c: William L. Phalen, P.O. Box 1346, Pittsburg, Kansas 66762  
John I. O'Connor, P.O.Box 1236, Pittsburg, Kansas 66762  
William F. Morrissey, Special Administrative Law Judge  
George Gomez, Director